No.

In the Supreme Court of the United States

OCTOBER TERM 1960

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

FOLEY LUMBER INDUSTRIES, INC.,

Petitioner,

v.

THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Foley Lumber Industries, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 17, 1961.

CITATIONS TO OPINIONS BELOW

The oral findings and order of the district judge (R. 108-10, 155-56) are unreported and are printed in the appendix hereto,

infra, p. 1a - 3a. The opinion of the Court of Appeals (R. 191-207) is reported in 286 F.2d 697, and is printed in the appendix hereto, *infra*, p. 4a - 19a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1961. (R. 208; p. 20a, *infra*.) Rehearing was denied on March 29, 1961. (R. 231; p. 21a, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In an action by The Buckeye Cellulose Corporation (hereinafter referred to as Buckeye) against Foley Lumber Industries, Inc. (hereinafter referred to as Foley), Buckeye prayed for a declaratory decree that an agreement between them was null and void for lack of consideration or, in the alternative, that their rights and obligations thereunder had ceased by reason of Foley's alleged termination of its logging and lumbering operations. Foley counterclaimed for damages by reason of Buckeye's breach of its promise to offer Foley first refusal of sawtimber stumpage which it had sold to others and demanded a jury trial of all issues.

After the jury was sworn, Buckeye moved for judgment on the pleadings. The district judge thereupon excused the jury and required the parties to introduce before him their evidence on the issues of consideration and of the mutuality and dependency of their promises. Upon conclusion of this hearing, the district judge decreed that the agreement "is now of no force and effect."

The questions presented are:

1. Was Foley deprived of its right to trial by jury by being compelled to present its evidence on these issues in this preliminary proceeding in order that the district judge might determine whether, upon conclusion of the jury trial, he would be obliged to direct a verdict against Foley?

2. Was the district judge justified in disposing of the case by this summary procedure on the theory that the facts were undisputed where there was serious dispute as to the inferences to be drawn from the undisputed facts?

3. Was the Court of Appeals justified in affirming the summary disposition of the case on these issues on a theory different from that adopted by the district judge when the effect of the affirmance was to dispose of the case on a theory with respect to which Foley had not been afforded an opportunity to present evidence?

RULES OF CIVIL PROCEDURE INVOLVED

The Federal Rules of Civil Procedure involved are Rules 12(c), 42(b) and 56(c), which provide in pertinent part:

> "(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."
>
> Rule 12(c), Federal Rules of Civil Procedure.

"(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Rule 42(b), Federal Rules of Civil Procedure.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 56(c), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This case involves important questions of federal procedure concerning the maintenance of trial by jury and the proper scope and application of the rules providing for summary disposition of cases on a motion for judgment on the pleadings treated as a motion for summary judgment. The questions presented arise out of a judgment entered by the district court at a hearing held out of the presence of the jury which had

been sworn to try the issues between the parties, and the Court of Appeals' subsequent affirmance in part and reversal in part of that judgment.

Buckeye filed a complaint against Foley seeking a declaratory judgment relieving it of its obligations to Foley under a written agreement. The jurisdiction of the district court was based on diversity of citizenship. Buckeye being an Ohio corporation with its principal place of business in that state, and Foley being a Florida corporation with its principal place of business in Florida.

The agreement, as amended, provides in clause 1 for the termination of a prior contract between the parties (R. 9; p. 26a, *infra*); in clause 2, that "Foley shall have the right of first refusal to purchase any sawtimber stumpage offered for sale by Buckeye for a period of fifteen (15) years . . ." (R. 13; p. 30a, *infra*); and in clause 3, that "Foley shall offer to Buckeye upon usual and customary terms all pulpwood obtained in connection with its lumbering operations, wherever conducted . . ." (R. 10; p. 27a, *infra*.) The agreement also contains other provisions not involved in this petition for certiorari.

Buckeye's complaint, as amended, alleged, *inter alia*, that at the time the agreement was entered into Foley was engaged in a major logging and lumbering operation in the performance of which the parties contemplated that Foley would acquire large quantities of pulpwood which Buckeye would be able to use in its cellulose operation; that Foley had never offered to sell Buckeye any pulpwood; that during the latter part of 1954 Foley completely terminated its logging and lumbering operations; and that Foley had attempted to assign its rights under the agreement. (R. 5-6; p. 22a-23a; *infra*.)

Buckeye took the alternative positions: (1) that the agreement was null and void for lack of consideration; and (2) that Buckeye's obligation to offer sawtimber stumpage to Foley ceased by reason of Foley's termination of its logging and lumbering operations and Foley's attempt to assign its rights under the agreement. (R. 7-8; p. 24a, *infra*.)

Foley, answering the complaint, denied that the parties contemplated that Foley would acquire large quantities of pulpwood which Buckeye would be able to use in its cellulose operation; admitted that it had not offered to sell Buckeye any pulpwood for the reason that it had acquired no pulpwood; denied that it had completely terminated its logging and lumbering operations; and contended that the agreement is currently valid and in effect. (R. 15-19; p. 31a-34a, *infra*.) Foley also filed a counterclaim for damages, alleging that Buckeye had breached the agreement by offering for sale and selling sawtimber stumpage to other parties without offering Foley the right of first refusal. (R. 20-21; p. 35a-36a, *infra*.) Buckeye admitted the sales but denied that they were in breach of the agreement. (R. 24-25; p. 37a, *infra*.) Foley demanded trial by jury of all issues. (R. 27; p. 38a, *infra*.)

The parties made extensive use of discovery procedures. After several pre-trial conferences, the parties submitted their respective statements of issues to be tried. (R. 28-31). On the date set for trial, an additional pre-trial conference was held in chambers and the district judge declared that the case would proceed to trial on his simplified statement of issues. (R. 27-34, 167). Immediately after this conference the case was called for trial in open court and the jury was selected, empaneled and sworn. (R. 36-37; p. 39a-40a, *infra*.) But the judge then recessed the trial and called for a further

conference in his chambers, at which he announced that instead of trying the whole case before a jury he would first try the issue of consideration without a jury. Buckeye moved for judgment on the pleadings on the issue of consideration and the judge agreed to entertain the motion.[1] Thereupon, the conference was concluded, and counsel and the judge returned to the courtroom.

The jury was excused without the consent of Foley and the district judge announced that he was ready to proceed on the issue of consideration and the mutuality and dependency of clauses 2 and 3 of the contract. (R. 38-39; p. 40a-41a, *infra*.) In support of its motion, Buckeye read from the pleadings and offered only one question and answer from the deposition of Foley's president. (R. 40-45; p. 41a-43a, *infra*.) The judge then called upon Foley's counsel to present evidence. Foley introduced testimony and other evidence to show that it was cutting sawtimber under the prior contract, dated October 10, 1951, at the time it entered into the contract in question, dated May 4, 1953, in support of its contention that Foley's agreement in the May 4, 1953 contract to terminate its right under the prior contract was sufficient consideration to support the May 4, 1953 contract without regard to Foley's promise to offer Buckeye such pulpwood as it might obtain in its logging and lumbering operation.[2] Foley also offered evidence bearing on the question of whether its right to first refusal of Buckeye's sawtimber stumpage was conditioned on Foley's remaining in a logging and lum-

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1 Unfortunately, the proceedings held in the judge's chambers after the jury was sworn were not taken down by the court reporter. Although the reporter was present at the request of Foley's attorneys, the trial judge instructed her that she need take down only formal rulings.

2 Buckeye's counsel objected to the calling of witnesses, insisting that "we are not in the trial of the case, we are only conducting a hearing on a motion for judgment on the pleadings." (R. 49; p. 43a-44a, *infra*.)

bering operation in which it would obtain pulpwood which could be offered to Buckeye. (R. 40-84.) When, however, Foley attempted to offer evidence that Buckeye was not looking for a source of supply of pulpwood from Foley's logging and lumbering operation, the district judge rejected the evidence as irrelevant. (R. 70-72.) Buckeye introduced rebuttal testimony by which it attempted to contradict some of the testimony presented by Foley. (R. 84-97.)

The district judge then heard argument by counsel and granted Buckeye's motion, which he characterized as "the motion of plaintiff for a declaration of rights under a contractual agreement." (R. 109; p. 48a, *infra*.) He declared that the testimony "if not absolutely and completely undisputed, is substantially undisputed on all material matters." Consideration of the pleadings, depositions and testimony, he said, "leads the court to the conclusion" that paragraphs 2 and 3 are mutually dependent and "that the whole agreement would be utter meaningless and pointless and absolutely no consideration running to Buckeye" unless Foley was required to and did offer pulpwood to Buckeye. (R. 109; p. 48a-49a, *infra*.) Because Foley admitted that it had offered no pulpwood to Buckeye, the district court, applying the theory that an obligation by Foley to offer pulpwood to Buckeye is essential to the validity of the promise, ruled the contract "is now of no force and effect" and dismissed Foley's counterclaim with prejudice.[3] (R. 156; p. 3a, *infra*.)

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3 Foley's counsel stated his understanding to be that the judge had ruled:

> ". . . that because Foley has not engaged in the lumbering operation which has been productive of pulpwood and has not offered any pulpwood to Buckeye, that Buckeye was not and is not obligated to offer Foley the first refusal."

and the district judge indicated that such was his ruling. (R. 110; p. 49a-50a, *infra*.)

Foley filed alternative motions for new trial and to amend the declaratory judgment order and both were denied. (R. 156-160.)

On appeal, the Court of Appeals for the Fifth Circuit held that the proceeding below was a motion for judgment on the pleadings converted by Rule 12(c) into a motion for summary judgment (R. 191; p. 4a, *infra*.), and that the procedure followed by the district court did not deprive Foley of a jury trial. (R. 197-199; p. 10a-12a, *infra*.) It held further that, whether or not Foley continued to engage in logging and lumbering operations, its promise while so engaged to offer all pulpwood obtained in connection with such operations to Buckeye was sufficient consideration as a matter of law for Buckeye's promise to give Foley first refusal to purchase any sawtimber stumpage offered for sale by Buckeye, and prevented the contract from being void *ab initio*. (R. 194; p. 6a-7a, *infra*.) However, the court further held that "whether such a naked promise from Foley was the real consideration which the parties had in mind presents a question as to the meaning or construction of the contract. . . ." (R. 194; p. 7a, *infra*.) Finding that the contract was ambiguous, the Court held that it was appropriate to consider evidence of the surrounding facts and circumstances. (R. 197; p. 10a, *infra*.)

After reviewing the evidence, the Court of Appeals concluded that the evidence offered by Foley did not prove the existence of any genuine issue as to any material fact, that only one inference could reasonably be drawn from the evidence offered, and that "the undisputed facts showed that Buckeye furnishing Foley a source of supply of sawtimber was to be in return for, and in effect conditioned on, Foley furnishing to Buckeye a source of supply of pulpwood."

(R. 203; p. 15a, *infra.*) It affirmed the district court's judgment that the contract is now of no force and effect, but on the different theory that Buckeye was released from its promise when Foley ceased to be engaged in logging and lumbering operations, sold its sawmill, or did some other unspecified act disabling Foley from providing a source of supply of pulpwood to Buckeye.

Upon the majority's holding that the contract was not void *ab initio* but had become "inoperative or ineffective," the Court of Appeals remanded the case to the district court with directions to grant Foley's motion for amendment of the judgment to the extent of determining the time as of which the contract became inoperative and ineffective, and as to whether evidence of Buckeye's breach of the contract while it was effective presents a genuine issue of fact which should be determined by the verdict of a jury. (R. 203; p. 15a, *infra.*)

Chief Judge Tuttle agreed with the majority that the case should have been disposed of on motion for summary judgment, yet dissented from the conclusion reached by the majority. He agreed with the majority that the contract was supported by valid consideration, but expressed the opinion that since Foley had carried out its promise to Buckeye, the case "should have been disposed of by a judgment that the obligations of Buckeye were outstanding subsisting obligations." (R. 204-207; p. 16a-19a, *infra.*)

Foley's petition for rehearing was denied, Judge Tuttle dissenting. (R. 231; p. 21a, *infra.*)

REASONS FOR GRANTING THE WRIT

1. The procedure followed by the district court in excusing the jury and attempting first to try the issue of consideration in order to ascertain if there were any issues necessary to be submitted to the jury, raises a serious and important question concerning the continued vitality of the constitutional right to trial by jury.

This Court has repeatedly emphasized the necessity for closely scrutinizing any procedure where the maintenance of the jury as a fact finding body is involved. *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959); *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958). In evolving principles for the protection of this fundamental right, this Court recently held in the *Beacon Theatres* case that not even Rule 42(b) allows the trial court to split the case issues and first try an equitable issue to the judge as finder of fact where the ultimate effect of such procedure is to deprive the parties of the opportunity and right to a jury trial on all issues of fact. The Court of Appeals for the Ninth Circuit has further elaborated on this principle by holding that, although the question of jurisdiction is one which the judge may determine for himself, the trial court could not first separate the issue of jurisdiction over the subject matter and try it separately to the judge where the factual merits of the case must be considered in deciding that issue. The court noted that in practice this procedure deprives the parties of the right to a jury trial. *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934 (9th Cir., 1959).

The record in the instant case shows that the proceeding in the district court was a preliminary trial of the issue of

consideration and of intent and meaning of the parties,[4] and not simply a hearing on motion for summary judgment. The district judge, in response to an objection by Buckeye that Foley should not be allowed to call witnesses since the court was not in the trial of the case, answered:

> "Yes. And also announced in chambers, let the record show this too, that the Court said it would take testimony surrounding this particular issue for me to decide if the Court can do so and if there are areas where there are no disputed facts of a substantial nature where the Court can enter a ruling, it is obviously the responsibility of the Court to give you a ruling on that before we proceed with other questions." (R. 49-50; p. 44a, *infra*.)

After hearing testimony the dictrict judge explained that the case was before him on "plaintiff's motion for a declaration of rights under a contractural agreement" on a set of facts "substantially undisputed" (R. 109; p. 48a, *infra*.), that he was primarily determining the relation of the parties and the "meaning and intention of the parties in drawing up, particularly, paragraphs 2 and 3 of the contract, limiting it to that particular issue" (R. 99; p. 46a, *infra*.), and that "the matter of the interpretation of these facts are quite disputed it is obvious." (R. 98; p. 45a, *infra*.)

Thus, in disposing of the case by resolving disputed interpretations concering the issues of consideration and meaning

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4 While the judge may construe a contract as a matter of law, it is well established that where a written contract is ambiguous and extrinsic evidence is required to determine the meaning and intention of the parties, such issues are questions of fact for the jury. E.g. *Severson v. Fleck*, 251 F.2d 920 (8th Cir., 1958); 3 Williston, Contracts, Sec. 616 (Rev. Ed. 1936); 3 Corbin Contracts, Sec. 554 (Rev. Ed. 1960). Similarly, the presence of a benefit or detriment sufficient to constitute a consideration is a question of fact, where it controverted. 17 C.J.S., Contracts, Sec. 617.

and intent of the parties, the district judge necessarily considered and evaluated the factual merits of the case, and ruled on issues which are generally for the jury's consideration in a plenary trial of all issues. The holding of a preliminary trial of separate issues to determine the sufficiency of the evidence to warrant submission to the jury is beyond the scope of summary judgment and directly conflicts with the basic principles enunciated in the *Beacon Theatres* case, *supra*, and *Marks Food Corp. v. Barbara Ann Baking Co., supra*.

The principle of *Beacon Theatres* requires that when a trial court is faced with mixed questions of law and fact the parties should not be put to a piecemeal presentation and litigation of the issues, one at a time, but should have the right to fully explore all the evidence on all issues in a plenary trial before the jury. For only when the trial judge has all the evidence in the case properly before him is he in a competent position to evaluate the evidence and determine whether to withdraw the case from the jury.

2. In undertaking to determine the issues of consideration and mutuality and dependency of the parties' promises, the district judge found it necessary to consider the extrinsic facts and circumstances surrounding the parties at the making of the contract. Having found that the extrinsic facts were "substantially undisputed," he entered summary judgment for the plaintiff (R. 109; p. 48a, *infra*.), even though he also found that "the interpretation of these facts are quite disputed." (R. 98; p. 45a, *infra*.) The majority opinion of the Court of Appeals, in approving this action by the district judge, conflicts with decisions in other circuits relating to the proper scope and application of the summary judgment rule.

Decisions by several courts of appeals, including the Fifth Circuit, have established that even though the basic evidentiary facts are undisputed, summary judgment is not appropriate for disposing of the case if there is a reasonable dispute as to the conclusions or inferences to be drawn from the facts. *Winter Park Tel. Co.* v. *Southern Bell Tel. & Tel. Co.*, 181 F.2d 341 (5th Cir., 1950); *Stevens* v. *Howard D. Johnson Co.*, 181 F.2d 390 (4th Cir., 1950), and cases therein cited. At least three circuits have expressly held that where a contract is ambiguous and reference to extrinsic evidence is necessary in order to determine the meaning of its terms and the intention of the parties, the trial court cannot dispose of the case on summary judgment but must allow the parties to present evidence on these issues in a plenary trial. *Severson* v. *Fleck*, 251 F. 2d 920 (8th.Cir., 1958); *Boro Hall Corp.* v. *General Motors Corp.*, 164 F. 2d 770 (2nd Cir., 1947); *Stevens* v. *Howard D. Johnson Co.*; *supra*.

The danger of first trying the case on summary judgment to determine whether the court may simply dispose of the issues as a matter of law was pointed out by the late Chief Judge Parker when he warned:

> "It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. . . . (Summary judgment) should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law."
>
> *Stevens* v. *Howard D. Johnson Co.*, *supra*, at 394.

The majority's holding in the instant case is in direct conflict with the cited decisions of the Second, Fourth and Eighth Circuits, and this Court should resolve this conflict in the interest of assuring uniform operation of the summary judgment rule in the federal courts.

3. The decision of the Court of Appeals is in conflict with the decision of this Court in *Fountain* v. *Filson*, 336 U. S. 681, 69 S. Ct. 754, 93 L. Ed. 971 (1949). In that case the district court granted defendant summary judgment on a claim that there was no resulting trust in favor of plaintiff. The Court of Appeals affirmed this ruling, but found that the facts showed another ground for relief on the basis of a personal obligation owed by the defendant to the plaintiff. Thereupon it considered the evidence which was before the district court and remanded for entry of summary judgment for the plaintiff on this claim. This Court reversed the Court of Appeals because it had considered and awarded summary judgment on a claim that had not been considered by the district court. Holding that the defendant should have an opportunity to dispute that claim, the Court said:

> "Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her."
>
> *Fountain* v. *Filson*, 336 U. S. 681, 683, 69 S. Ct. 754, 756 (1949).

In the instant case the preliminary trial conducted by the district judge was expressly limited to the issues of consideration and mutuality and dependency of the parties' promises. Throughout the proceeding, and in his verbal order, the district judge evidenced the opinion that Foley's promise could be sufficient consideration for Buckeye's promise only if there was an obligation on Foley to offer pulpwood for Buckeye's first refusal. Accordingly, the district judge excluded evidence offered by Foley for the purpose of showing that Buckeye was not looking to Foley as a source of supply of pulpwood. (R. 70-72.) In other words, the district judge reasoned that either Foley was under an obligation to offer pulpwood or there was no consideration for Buckeye's promise. And, based on such reasoning, he held that, since Foley admittedly had not offered pulpwood to Buckeye and was not in a position to offer pulpwood, there was a failure of consideration and the contract "is now of no force and effect." (R. 107-110, 155, 156; p. 3a; 47a-50a, *infra*.)

The Court of Appeals disagreed with the district judge's reasoning and held:

> "Whether or not Foley continued to engage in logging and lumbering operations, its promise while so engaged to offer to Buckeye all pulpwood obtained in connection with any such operations was sufficient consideration for Buckeye's promise to give Foley first refusal to purchase any sawtimber stumpage offered for sale by Buckeye. Each promisor bound himself not to sell any of its output to a third person before first offering it to the promisee. . . ."
>
> (R. 194; p. 6a-7a, *infra*.)

Having rejected the theory upon which the district judge based his summary judgment, the majority of the Court of Appeals found that the contract was ambiguous and undertook to examine the extrinsic evidence offered before the district judge for the purpose of determining the meaning of the contract and the intention of the parties. Then, having examined this evidence, the majority of the Court of Appeals held that "Buckeye furnishing Foley a source of supply of sawtimber was to be in return for, and in effect conditioned on, Foley furnishing to Buckeye a source of supply of pulpwood" (R. 203; p. 15a, *infra.*), and that the contract became inoperative or ineffective "when Foley ceased to be engaged in any logging and lumbering operations." (R. 194; p. 7a, *infra.*)

The evidence offered by Foley and excluded by the district judge that Buckeye was not looking to Foley for a source of supply of pulpwood was directly material to the theory upon which the Court of Appeals disposed of the case. Moreover, the pleadings raised a disputed issue as to whether or not Foley had ceased to be engaged in any logging and lumbering operations (R. 16-17; p. 32a-33a, *infra.*), and the district judge neither heard evidence on this issue nor attempted to determine it.

Thus, the summary judgment against Foley has been affirmed, not on the theory upon which it was entered, but upon an entirely different theory involving issues neither tried nor determined by the district judge. As a result, Foley has been deprived of the right to present evidence upon the matters controlling the ultimate determination of its case by the Court of Appeals' decision contrary to *Fountain* v. *Filson, supra.*

CONCLUSION

As this case presently stands, Foley is faced with a holding by the Court of Appeals that its rights under the contract no longer exist, although the contract was valid and effective at the time of its execution and although Foley has not breached any of its obligations under the contract. The errors and misconceptions which account for this incongruous holding are the result of the efforts of the district court and the Court of Appeals to dispose of the case through the improper use of summary procedure.

The decision of the Court of Appeals not only conflicts with the decisions of this Court and other courts of appeals, but so far departs from the accepted and usual course of judicial proceedings and so far sanctions such a departure by the lower court as to call for an exercise of this Court's power of supervision.

Wherefore, petitioner prays this Court to grant its writ of certiorari to review the decision of the Court of Appeals and, upon certiorari granted, to direct the Court of Appeals to remand the case to the district court for a full jury trial on all issues.

Respectfully submitted,

CHESTER BEDELL

Counsel for Petitioner.

C. HARRIS DITTMAR

Of Counsel

May 8, 1961.

APPENDIX A

In the United States District Court for the Northern District of Florida

Oral Opinon of the District Judge, February 15, 1960.

THE COURT:

Gentlemen, I don't believe it will serve any useful purpose to reserve ruling of the court and I feel we must proceed with this matter.

We have had here a rather exhaustive discovery, pre-trial, motions, depositions, argument of counsel, following this matter. As a result of all that, the issue has come on before the court on the motion of plaintiff for a declaration of rights under a contractural agreement entered into May 4, 1953, and with particular reference to the consideration of paragraphs 2 and 3 of this contract, in the light of all the other provisions of the contract.

The testimony here that has been admitted, if not absolutely and completely undisputed, is substantially undisputed on all material matters. The answer of the defendant, the depositions, and the testimony that was taken, leads the court to the conclusion that paragraphs 2 and 3 of this contract of May 4, 1953, are mutually dependent and that they are in fact the very core of the agreement.

The quip pro co (sic) of the parties of the agreement, one to the other, saw timber, right of refusal from Buckeye to Foley; pulpwood right of refusal from Foley to Buckeye, the court has given consideration and particular attention to the cases cited by defendant, the Pfann case referred to and the Dickerson case, and with reference to the Pfann case the court does not by this ruling say that Foley has been placed upon it an affirmative burden to operate a lumbering operation, but the court does find that by these two agreements – Foley to offer pulpwood and Buckeye to offer saw stumpage on like terms – that the whole agreement would be utter meaningless and pointless and absolutely no consideration running to Buckeye for this operation. Without reference to the rather full testimony going to matters leading to the contract of 1953, the court finds this is true. Also, all the testimony with reference to other provisions of the contract and, also, the testimony with reference to the hardwood harvesting doesn't alter this finding but, in fact, tends to support the finding of the court in this regard.

Therefore, the court will grant the motion and appropriate settle order will be presented by counsel and be filed in the case. This verbal order is now of record.

Now gentlemen, that being the situation, where do we stand with reference to this lawsuit?

MR. BEDELL:

I suppose your Honor's ruling that because Foley has not engaged in the lumbering operation which has been productive of pulpwood and has not offered any pulpwood to Buckeye, that Buckeye was not and is not obligated to offer Foley the first refusal and I assume your Honor will enter a decree

so construing the contract and dismissing Foley's counterclaim. I suppose that ends the lawsuit. That is the way I regard it.

THE COURT:

I was under the impression that that was a pretty final order, Mr. Bedell. I did realize that but I was wondering if there was anything I had overlooked that we had — the hair with the hide so-to-speak.

(R. 108-110)

DECLARATORY JUDGMENT ORDER

(Filed: February 16, 1960)

This cause coming on for hearing upon Plaintiff's Motion for Judgment, and upon consideration of the pleadings, depositions, answers to interrogatories, answers to requests for admissions and the testimony of the parties and witnesses heard in open court, the court finds said Motion to be well taken.

IT IS, THEREFORE, ORDERED AND ADJUDGED that plaintiff is entitled to the relief prayed for in that the contract between the parties dated May 4, 1953, a true and correct copy of which, as amended, is attached to the Amended Complaint, is now of no force and effect and neither party is under any obligation to the other with respect thereto.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant's Amended First Counterclaim and Amended Second Counterclaim be, and the same hereby are dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants pay the costs of this action.

To all of which Defendant excepts.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 18334

FOLEY LUMBER INDUSTRIES, INC.,

Appellant.

versus

THE BUCKEYE CELLULOSE CORPORATION,

Appellee.

Appeal from the United States District Court for the Northern District of Florida

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(February 17, 1961.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a judgment entered upon a "Motion for Judgment on the Pleadings" which had been converted into a motion for summary judgment.[1] The summary judgment declared that a contract

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[1] ". . . . If, on a motion for judgment on the pleadings matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(c), Federal Rules of Civil Procedure, Title 28 U.S. Code.

between the parties, dated May 4, 1953, "is now of no force and effect and neither party is under any obligation to the other with respect thereto."

Appellee Buckeye[2] first moves to dismiss the appeal on the ground that the record is incomplete and fails to include the depositions filed in the district court. In support of its motion to dismiss, the appellee cites *In re Chapman Coal Company*, 7 Cir., 1952, 196 F.2d 779, 785; *T.V.T. Corporation v. Basiliko*, D.C. Cir., 1958, 257 F.2d 185, 187; and *McBee v. United States*, 10 Cir., 1942, 126 F.2d 238. In the first two cited cases the appeal was not dismissed but the judgment was affirmed. In the last cited case the appellant did not designate any evidence whatever to be included in the record and thus failed completely to comply with Rule 75 (a), Federal Rules of Civil Procedure. We agree with the Seventh Circuit that the appellee's remedy for any deficiency in the record "lies not in a motion to dismiss but in proper steps to have the record corrected under Federal Rule 75 (h)." *Shuttleworth v. Crown Can Co.*, 7 Cir., 1947, 164 F.2d 23, 25.[3]

Further, we agree with the appellant that the record is not deficient. The district court considered only those matters

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[2] The appellee will hereafter be referred to as Buckeye and the appellant as Foley.

[3] The pertinent part of the Rule reads:

"... If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court." Rule 75(h), Federal Rules of Civil Procedure, Title 28, U.S. Code.

called to its attention on the motion for summary judgment.[4] It appears that all of the evidence called to the attention of the district court on that motion is included in the record. The motion to dismiss the appeal is therefore denied.

The contract of May 4, 1953, provided that, "Foley shall have the right of first refusal to purchase any sawtimber stumpage offered for sale by Buckeye for a period of fifteen (15) years from May 4, 1953." It further provided that, "Foley shall offer to Buckeye upon usual and customary terms all pulpwood obtained in connection with its lumbering operations, wherever conducted, at the then current market price to pulpwood dealers for pulpwood in the locality where said pulpwood is located."

Buckeye insists that the judgment of the district court declaring that contract "now of no force and effect" should be sustained upon one of several grounds. First, Buckeye claims that the contract was void *ab initio* for lack of sufficient consideration.

The contract expressly stated the considerations upon which it was based: "NOW THEREFORE, in consideration of Five Dollars ($5.00) paid by Buckeye to Foley, receipt of which is hereby acknowledged, and in consideration of the premises and promises herein contained . . ."

Whether or not Foley continued to engage in logging and lumbering operations, its promise while so engaged to offer

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[4] THE COURT:

"We can't just simply take the whole file to New Orleans. The court certainly has not considered those matters which have not been called to its attention. . . . I think this can get out of hand. I am not going to let you introduce everything because the record is quite clear upon which I based my ruling on there

to Buckeye all pulpwood obtained in connection with any such operations was sufficient consideration for Buckeye's promise to give Foley first refusal to purchase any sawtimber stumpage offered for sale by Buckeye. Each promisor bound himself not to sell any of its output to a third person before first offering it to the promisee. It is not necessary to refer to other promises and provisions of the contract of May 4, 1953, to hold, as a matter of law, that these two promises were sufficient consideration, the one for the other, to prevent the contract from being void *ab initio*.[5] Whether such a naked promise from Foley was the real consideration which the parties had in mind presents a question as to the meaning or construction of the contract presently to be considered.

Secondly, Buckeye insists that the two promises were so mutually dependent as that when Foley ceased to be engaged in any logging and lumbering operations, Buckeye was released from its promise to give Foley first refusal to purchase any sawtimber stumpage offered for sale by Buckeye; or, in other words, that Buckeye's promise was conditioned upon Foley's continuing to engage in logging and lumbering operations.[6]

We go first to the pertinent provisions of the written contract:

> "2. Foley shall have the right of first refusal to purchase any sawtimber stumpage offered for sale

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[5] See Corbin on Contracts, pp. 522, 523, §158; 1 Williston Contracts §104A.

[6] While, as hereinafter ruled, this insistence on the part of Buckeye, if sustained, would support the district court's declaration that the contract "is now of no force and effect," it would leave open the question of any breach on the part of Buckeye prior to Foley's abandonment of logging and lumbering operations.

by Buckeye for a period of fifteen (15) years from May 4, 1953. It is agreed that any timber purchased by Foley under the terms of this contract is to be harvested by Foley using his own employees unless agreements in writing are made between Buckeye and Foley for others to do the harvesting. The price for this stumpage is to be determined by Buckeye with proper regard for the current market price of sawtimber stumpage of similar type grade and accessibility in the same locality. If Foley does not accept any such offer, Buckeye shall be unrestricted in connection with sale to other parties at the same price or higher than offered to Foley. Before sawtimber may be sold to other parties at a price less than that offered to Foley, it must first be reoffered to Foley at the lower price. Nothing herein contained shall, however, prevent or in any other manner limit Buckeye from trading any of its sawtimber stumpage for pulpwood stumpage or other property."

"3. Foley shall offer to Buckeye upon usual and customary terms all pulpwood obtained in connection with its lumbering operations, wherever conducted, at the then current market price to pulpwood dealers for pulpwood in the locality where said pulpwood is located. If Buckeye does not accept any such offer, Foley shall have the right, without restriction, to sell the same to others at same price or higher than offered to Buckeye."

If the terms of the written contract create legal obligations, without any uncertainty as to the object and extent of the engagements, then under the law of Florida, as elsewhere, "it is conclusively presumed that the whole engagement and

the extent and manner of their undertaking is contained in the writing." *Gendzier v. Bielecki*, Fla., 1957, 97 So.2d 604, 608. The contract does not expressly state whether the two promises are dependent or independent. It does state that the promises constitute "consideration," and from that it may be inferred that the promises were expected to have some real substantial value. Further, the provision " . . . that any timber purchased by Foley under the terms of this contract is to be harvested by Foley using his own employees, etc." made it necessary for Foley to remain in the logging business to some extent if he would exercise his option to purchase sawtimber.

Professor Williston states that ". . . the presumption in bilateral agreements, unless some reason can be shown to the contrary, is that the respective promises are for an agreed exchange, that is, are dependent." 3 Williston on Contracts (rev.ed.) §825, p. 2312. In *Bank of Columbia v. Hagner*, 1828, 1 Pet. (U.S.) 455, 465, the Court said:

> "Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the inclination of courts has strongly favored the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property, without receiving the consideration; nor the purchaser to part with his money, without an equivalent in return."

See also, *Telfener v. Russ*, 1896, 162 U.S. 170, 181, 182; *Kelsey v. Crowther*, 1896, 162 U.S. 404, 409. In the Comment to

A.L.I., Restatement Contracts, §266, it is said:

> "It cannot be supposed that parties would exchange unconditional promises, each promise being the consideration for the other, except on the assumption that they regarded the respective performances as also subjects of exchange. When parties enter into an ordinary bilateral contract, therefore, they contemplate a double exchange, first an exchange of promises and later an exchange of performances."

If we were to construe the written contract, without the aid of parol evidence, we would have to hold that the promises are dependent. In our opinion, however, the contract is not so certain and unambiguous as to preclude, as aids to its construction, evidence of the surrounding facts and circumstances to the end that the court can, so far as possible, view the contract from the positions of the parties at the time of its execution.

Before examining such evidence, however, we consider a preliminary insistence that the procedure followed by the district court wrongfully deprived Foley of a right to a trial by jury.

Actually a jury was empaneled. Prior thereto, the parties had taken some five hundred pages of depositions. Three pretrial conferences had been held, at the conclusion of which the court had undertaken to define the issues. After the jury had been empaneled, the record recites that: "Court and counsel had a discussion off the record and it was decided a further pretrial conference would be of benefit in the trial of the case."

In that conference Buckeye made a motion for judgment on the pleadings, which, as heretofore stated, was converted into a motion for summary judgment. Each of the parties was given full opportunity to present testimony on the question of the existence of disputed facts material to the issue of the interrelationship of paragraphs two and three of the agreement of May 4, 1953. The procedure was described by the district court as follows:

> "Well, let me say here for the clarification of the record, and I am certainly sure, Mr. Bedell, whether the matter be judgment labelled or entitled judgment on the pleadings or not, the matter is before the court on a set of facts, which, if not in controversy, this court is authorized then and required as a matter of fact and has the affirmative responsibility of entering a ruling of law. The pleadings, some of the matters in the pleadings have been alluded to and counsel for both sides have been given in this proceeding rather wide latitude, as has already been commented on, in putting in whatever they could even remotely relevant to showing the relationship of the parties and to—on this particular issue—and the meaning and intention of the parties in drawing up, particularly, paragraphs 2 and 3 of the contract, limiting it to that particular issue. So there should not be any confusion as far as that is concerned as to where we stand and where we have at least come from at this point."

Foley had actual notice, and ample time to prepare to meet the questions presented by the motion. Being prepared to try the case, Foley does not claim that it was unprepared to prove the existence of disputed issues of fact. We do not agree with Foley's criticism of the procedure followed by

the district court. See *Dinwiddie v. Brown*, 5 Cir., 1956, 230 F.2d 465, 468; *Herron v. Herron*, 5 Cir., 1958, 255 F.2d 589, 593.

Upon the hearing on the motion for summary judgment, Buckeye called attention to Foley's admission in its answer, "that at the time of the May 4, 1953 agreement was entered into it was actively engaged in a major logging and lumbering operation as alleged, etc."; that it "was in the process of constructing a new sawmill at Shamrock, Florida, etc." Foley further admitted that "the successful operation of its new mill at Shamrock, Florida, would require defendant to buy and cut large quantities of timber on lands owned by the plaintiff and others in the area, and all of this was well known to the plaintiff as well as to the defendant." Foley's answer further disclosed that in 1955 it sold its sawmill at Shamrock, Florida, and undertook to assign its rights under the May 4, 1953, agreement, but that Buckeye refused to permit it to assign said rights and the assignment never became effective. Its President, Lester Foley, admitted by deposition that it never did conduct the lumbering operations contemplated at the time of the contract. It answered an interrogatory requesting it to list "the total number of all offices and employees in the employment of Foley Lumber Industries, Inc. on May 4, 1953 and on each anniversary of May 4, 1953 up to and including May 4, 1959" as follows:

"May 4, 1953, approximately 200 employees;
May 4, 1954, approximately 200 employees;
May 4, 1955, 4 employees;
May 4, 1956, 4 employees;
May 4, 1957, 4 employees;
May 4, 1958, 3 employees;
May 4, 1959, 3 employees."

Foley offered evidence that Buckeye's mill was not completed until late 1954 or early 1955, so that on May 4, 1953, Buckeye had no need for pulpwood. Foley introduced an earlier contract between it and Buckeye dated October 10, 1951, relating to Foley's management of timberlands acquired by Buckeye from P. C. Crapps & Son. That contract provided that, "When Buckeye proposed pulp mill is in operation, Foley shall deliver so much of the pulpwood from Buckeye's Lands as Buckeye may direct to Buckeye's Mill, and Buckeye shall pay therefore (sic) on the same basis as outlined above, Paragraph 15." That contract was terminated by the agreement of May 4, 1953. Foley offered evidence that Buckeye had other areas and sources of getting pulpwood; that at Foley's request in the negotiations of the contract of May 4, 1953, Buckeye had agreed to the striking from paragraph 2 of a provision "but only for processing in its (Foley's) own saw mill." Foley's letter of objection to that provision read in pertinent part:

> ". . . . There was no thought by the parties that I should be required to process this stumpage in my own mill. If I am entitled to first refusal to purchase sawtimber stumpage, what possible difference could it make to Buckeye whether I sold such logs or processed them . . . ."[7]

Foley proved also that the draft of the agreement at first had limited Foley's right of first refusal to purchase sawtimber stumpage to ten years, and that at Foley's request, this had been extended to fifteen years.[8]

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[7] It may be remarked that Foley's selling of the logs instead of processing them would not have reduced the amount of pulpwood obtained in connection with Foley's lumbering operations and which should be offered to Buckeye for sale.

[8] It may be noted that Foley's promise in paragraph 3 is unlimited as to time, if the two promises are construed to be entirely independent, and thus that is not a very reasonable construction.

At the conclusion of the hearing on the motion for summary judgment, the district court rendered the following oral opinion:

> "We have had here a rather exhaustive discovery, pretrial motions, depositions, argument of counsel, following this matter. As a result of all that, the issue has come on before the court on the motion of plaintiff for a declaration of rights under a contractural (sic) agreement entered into May 4, 1953, and with particular reference to the consideration of paragraphs 2 and 3 of this contract, in the light of all the other provisions of the contract.
>
> "The testimony here that has been admitted, if not absolutely and completely undisputed, is substantially undisputed on all material matters. The answer of the defendant, the depositions, and the testimony that was taken, leads the court to the conclusion that paragraphs 2 and 3 of this contract of May 4, 1953, are mutually dependent and that they are in fact the very core of the agreement.
>
> "The quip pro co (sic) of the parties of the agreement, one to the other, saw timber, right of refusal from Buckeye to Foley, pulpwood right of refusal from Foley to Buckeye, the court has given consideration and particular attention to the cases cited by defendant, the Pfann case referred to and the Dickerson case, and with reference to the Pfann case (H.M. Pfann & Co. v J. C. Turner Cypress Lumber Co., 5 Cir., 1912, 194 Fed. 69) the court does not by this ruling say that Foley has been placed upon it an affirmative burden to operate a lumbering operation, but the court does find that by these two agreements—Foley to offer pulpwood and Buckeye

to offer saw stumpage on like terms—that the whole agreement would be utter meaningless and pointless and absolutely no consideration running to Buckeye for this operation. Without reference to the rather full testimony going to matters leading to the contract of 1953, the court finds this is true. Also, all the testimony with reference to other provisions of the contract and, also, the testimony with reference to the hardwood harvesting doesn't alter this finding but, in fact, tends to support the finding of the court in this regard:

"Therefore, the court will grant the motion and appropriate settle order will be presented by counsel and be filed in the case. This verbal order is now of record."

We agree with the district court that the evidence offered by Foley on the hearing of the motions for summary judgment did not prove the existence of any genuine issue as to any material fact, and that only one inference can reasonably be drawn from that evidence. The undisputed facts showed that Buckeye furnishing Foley a source of supply of sawtimber was to be in return for, and in effect conditioned on, Foley furnishing to Buckeye a source of supply of pulpwood. In the main, therefore, we agree with the judgment of the district court.

Foley's motion for an amendment of the judgment of the district court should, however, be granted to the extent of determining the time as of which the contract of May 4, 1953, became inoperative or ineffective, and as to whether evidence of Buckeye's breach of the contract while it was effective presents a genuine issue of fact which should be determined by the verdict of a jury. To that end the judgment dismissing

Foley's counterclaim is reversed. The costs of appeal are taxed three-fourths against Foley and one-fourth against Buckeye.

AFFIRMED IN PART AND IN PART REVERSED AND REMANDED.

TUTTLE, Chief Judge, DISSENTING:

With deference I dissent. I agree that this case should have been disposed of on motion for summary judgment. However, I think it should have been disposed of by a judgment that the obligations of Buckeye were outstanding subsisting obligations.

I am unable to understand just what legal issue was decided by the trial court and I am equally unable to understand what legal principal has been applied by this Court to sustain the judgment below. The majority opinion seems to base its affirmance of the judgment on the proposition that clauses 2 and 3 express mutually dependent obligations. With that I agree fully. Moreover, the opinion seems to hold that the contract was valid when executed, and that all that was required to make it a valid contract was Foley's promise, *while engaged in logging and lumbering operations*, "to offer to Buckeye all pulpwood obtained in connection with any such operations," and the opinion holds that this promise "was sufficient consideration for Buckeye's promise to give Foley first refusal to purchase any saw timber stumpage offered for sale by Buckeye." I agree with all of this. Having done so, I then believe that this ends our inquiry, because we have thus construed the language of clause 3 as merely requiring Foley to offer to

Buckeye all pulpwood it obtains, and there was no requirement on Foley to continue in the logging or lumbering business to obtain pulpwood in order for it to insist on Buckeye's performance.

Now, however, the majority seems to confuse the doctrine of dependency of provisions with the entirely different one of failure of consideration. The Court seems to say that if the obligations are mutually dependent, then Foley was required to remain in a position to supply pulpwood to Buckeye. I think this has nothing to do with dependency, but is purely a matter of construing clause 3. All that the dependency principle requires is that before Foley can require performance from Buckeye it must be in performance of its obligations.

We thus come to a construction of clause 3 to determine what it required Foley to do. I understand that the majority agree with me in that it requires merely that if Foley obtains any pulpwood from logging and lumbering operations, it is required to furnish such pulpwood to Buckeye. On that construction Foley has no duty or obligation to "obtain" a cord of pulpwood. It has no obligation to stay in a business that would enable it to "obtain" any.

We are bound to assume that the parties knew what they were doing if each of them, assuming that they both "contemplated" staying in their respecti business, was satisfied to agree, as the majority opinion seems to hold that they did, "not to sell any of its output to a third person before first offering it to the other."

The majority, however, holds that the sale of the mill by Foley or some other action by Foley somehow caused the contract to "become inoperative or ineffective." These are strange

words in dealing with obligations under a written contract. The Court reaches them by a statement that "the undisputed facts showed that Buckeye furnishing Foley a source of supply of saw timber was to be in return for and in effect conditioned on Foley furnishing to Buckeye a source of supply of pulpwood." This statement, without expressly saying so, simply repudiates or supplants the written contract, construed to mean the opposite, by referring to "the undisputed facts."

It seems to me that if the Court is construing the language of clause 3 to mean that if Foley obtained no pulpwood then it had no right to demand performance by Buckeye of its obligation, that should be said. The difficulty with that, I apprehend, is that the trial court could not have so construed clause 3 on a motion for summary judgement. This is true for Foley attempted to show that Buckeye was *not* looking to it as a source of supply of pulpwood from its logging and lumbering operations because Buckeye did not even have a pulpwood plant for something over a year after the contract was entered into, and because it knew that the logging and lumbering operations then carried on by Foley *would not* produce any pulpwood for Buckeye. Some of this evidence was rejected by the trial judge, who then ruled that the evidence was "undisputed."

However that may be, I think it plain that the majority, having correctly interpreted the contract as not requiring Foley's continued operation, abandons that interpretation when it appears that, after some subsequent act by Foley, it seemed inequitable for Foley to hold Buckeye to its admitted obligation. I know of no principal of contract law that permits a court thus to remake the agreement of the parties.

I agree that the judgment can not stand, and that under the construction adopted by the majority there must be a trial

on the damages suffered by Foley prior to the time the Court finds that Buckeye's obligation became "inoperative or ineffective."

However, I think the judgment should be reversed and that judgment should be rendered in favor of the appellant holding that the obligations of Buckeye are still binding and subsisting so long as Foley carries out its promise to give Buckeye first refusal of any pulpwood obtained by it from its logging and lumbering business.

JUDGEMENT

Extract from the Minutes of February 17, 1961.

No. 18334

FOLEY LUMBER INDUSTRIES, INC.

versus

THE BUCKEYE CELLULOSE CORPORATION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court:

It is further ordered and adjudged that the appellant, Foley Lumber Industries, Inc., be condemned to pay three-fourths of the costs of appeal; and that the appellee, The Buckeye Cellulose Corporation, be condemned to pay one-fourth of the costs of appeal; for all of which execution may be issued out of the said District Court.

"Tuttle, Chief Judge, Dissenting."

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

JUDGE TUTTLE DISSENTS.

(ORIGINAL FILED – March 29, 1961.)

APPENDIX B

Excerpts from Certified Record

AMENDED COMPLAINT

(Filed: February 11, 1959)

(1) Plaintiff, The Buckeye Cellulose Corporation, is a corporation incorporated under the laws of the State of Ohio, with its principal offices in Cincinnati, Ohio, and whose post office address is Post Office Box 539, Cincinnati 1, Ohio. Defendant, Foley Lumber Industries, Inc., is a corporation organized under the laws of Florida, with its principal office in Perry, Florida, and whose post office address is 1501 Prudential Building, Jacksonville, Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

(2) Plaintiff states that on May 4, 1953, it entered into a written agreement with defendant, a true and exact copy of which, marked Exhibit "A" is attached hereto and made a part hereof. Said agreement was subsequently amended by letter dated December 28, 1954, an exact copy of the amendment, marked Exhibit "B" being attached hereto and made a part hereof.

(3) Plaintiff at all times mentioned herein was and still is actively engaged in the manufacture of cellulose produced from pulpwood at Foley, Florida, and its production of cellulose requires it to maintain adequate sources of supply of pulpwood, all of which defendant, through its agents and employees, knew at all times herein mentioned.

(4) Plaintiff states that at the time the said May 4, 1953, agreement was entered into, defendant was actively engaged in a major logging and lumbering operation in the northern Florida area; that at said time defendant was in the process of constructing a sawmill at Shamrock, Florida, the successful operation of which plaintiff and defendant knew would require defendant to buy and cut large quantities of timber on lands owned by plaintiff and others in the area, in the pursuance of which the parties contemplated that defendant would acquire large quantities of pulpwood which plaintiff would be able to use in its cellulose operation at Foley, Florida.

(5) Plaintiff states that at no time since May 4, 1953, has defendant offered to sell plaintiff any pulpwood.

(6) Plaintiff states that during the latter part of 1954 defendant completely terminated its logging and lumbering operations in the northern Florida area.

(7) Plaintiff states that defendant on or about January 3, 1955 entered into a written agreement with Suwannee Lumber Manufacturing Co., Inc., hereinafter called Suwannee, by part of the terms of which defendant attempted to assign to Suwannee any and all of its rights under the said May 4, 1953 agreement.

(8) Plaintiff states that it has and will continue in the future to enter into agreements with other persons or firms in the lumber industry in the northern Florida area by the terms of which plaintiff trades sawtimber stumpage for pulpwood chips. Under these agreements sawtimber stumpage and pulpwood chips are traded at prices based upon fair market values and differences in the accounts of the respective parties are adjusted periodically by cash payments.

(9) Plaintiff states that subsequent to May 4, 1953, it has acquired various timberlands, and may in the future acquire additional timberlands.

(10) Plaintiff claims and contends:

(a) That the obligations of plaintiff to be performed under the agreement of May 4, 1953, are null and void for lack of consideration.

(b) That by reason of defendant's termination of its logging and lumbering operations and the attempted assignment of said May 4, 1953 agreement as alleged in Paragraphs (6) and (7) herein, the obligation of plaintiff, if any, under the terms of said May 4, 1953 agreement to offer its sawtimber stumpage to defendant before offering it for sale to others ceased.

(c) That the obligation of plaintiff, if any, to offer the first refusal of sawtimber stumpage to defendant does not extend to sawtimber stumpage which plaintiff trades for pulpwood chips as set forth in Paragraph (8).

(d) That the obligation of plaintiff, if any, to offer the first refusal of sawtimber stumpage to defendant does not extend to timber on lands acquired by plaintiff subsequent to May 4, 1953.

(11) Defendant contends that said agreement of May 4, 1953, is valid and in full force and effect and that defendant has the right of first refusal to all sawtimber stumpage offered for sale by plaintiff or offered in trade for pulpwood chips as described in Paragraph (8) and that said agreement applies to sawtimber stumpage on all lands owned by plaintiff on May 4, 1953, and on all lands acquired subsequent to said date.

(12) Plaintiff thereupon alleges that there exists a controversy between the parties hereto.

WHEREFORE, plaintiff prays for a declaratory judgment:

(a) Declaring that the agreement of May 4, 1953 is null and void; or

(b) That in the event said agreement of May 4, 1953 is not declared null and void, declaring that the rights of the defendant and the obligations of the plaintiff to the defendant under the terms of said agreement have ceased; or

(c) That in the event plaintiff is not adjudged entitled to the relief prayed for in either (a) or (b) above, declaring that

(1) Said agreement does not extend to timber on lands acquired by plaintiff subsequent to May 4, 1953;

(2) That said agreement does not extend to sawtimber stumpage traded by plaintiff for pulpwood chips as alleged in paragraph (8).

EXHIBIT "A"

AGREEMENT

THIS AGREEMENT, made and entered into as of the 4th day of May, 1953, by and between THE BUCKEYE CELLULOSE CORPORATION (hereinafter called "Buckeye") an Ohio corporation with its principal office at Cincinnati, Ohio, duly qualified to do business in Florida, and FOLEY LUMBER INDUSTRIES, INCORPORATED (hereinafter called "Foley")

a Florida corporation having its principal office in Foley, Florida, WITNESSETH THAT:

WHEREAS, the parties have heretofore entered into an agreement, dated the 10th day of October, 1951, (hereinafter referred to as the "Agreement of October 10, 1951") relating to management of timberlands, management and operation of sawmill, timbercutting, and pulpwood, and now desire to terminate said agreement and each portion thereof, and further desire to enter into this Agreement;

NOW THEREFORE, in consideration of Five Dollars ($5.00) paid by Buckeye to Foley, receipt of which is hereby acknowledged, and in consideration of the premises and promises herein contained, the parties hereto agree as follows:

1. Said agreement of October 10, 1951, and each and every portion thereof, and all the rights and obligations of the parties thereunder, shall be and they hereby are terminated as of the 4th day of May, 1953. In connection with that portion of paragraph 6 of said agreement of October 10, 1951, which relates to the dismantling and selling of Buckeye's sawmill at Foley, Florida; it is contemplated that Foley will buy certain of said equipment, and that final settlement between the parties will be the subject of a separate agreement. In connection with paragraph 25 of said agreement of October 10, 1951, relating to the sale and lease of described logging and automotive equipment, it is also contemplated that settlement between the parties will be the subject of said separate agreement.

2. Foley shall have the right of first refusal to purchase any sawtimber stumpage offered for sale by Buckeye. It is agreed that any timber purchased by Foley under terms of this contract is to be harvested by Foley using his own

employees and not through use of contractors or others. The price for this stumpage is to be determined by Buckeye with proper regard for the current market price of sawtimber stumpage of similar type grade and accessibility in the same locality. If Foley does not accept any such offer, Buckeye shall be unrestricted in connection with sale to other parties at same price or higher than offered to Foley. Before sawtimber may be sold to other parties at a price less than that offered to Foley, it must be reoffered to Foley at the lower price. Nothing herein contained shall, however, prevent or in any other manner limit Buckeye from trading any of its saw-timber stumpage for pulpwood stumpage or other property.

3. Foley shall offer to Buckeye upon usual and customary terms all pulpwood obtained in connection with its lumbering operations, wherever conducted, at the then current market price to pulpwood dealers for pulpwood in the locality where said pulpwood is located. If Buckeye does not accept any such offer, Foley shall have the right, without restriction, to sell the same to others at same price or higher than offered to Buckeye.

4. In the event that no mutual agreement can be reached on "current market price" within paragraphs 2 and 3 hereof, "current market price" shall be determined by each part selecting an arbitrator, and in event these two arbitrators do not agree within ten (10) days, a third arbitrator will be selected by them whose decision will be final. If arbitrators cannot agree on a third arbitrator within ten (10) days the stumpage offer in question will take the status of an offer refused by Foley. The cost of any such arbitration shall be borne equally by the parties.

5. Certain contracts dated, respectively, February 14, 1950, January 29, 1951, and March 30, 1951, between P. C. Crapps,

P. C. Crapps, Jr., and Virginia B. Crapps, on the one hand, and Brooks-Scanlon, Inc., on the other, relating to timber-cutting on property acquired by Buckeye, have heretofore been assigned to Foley, and said agreement of October 10, 1951, was made subject to said contracts. Buckeye agrees that, as and when said contracts expire, the terms thereof will be extended to January 1, 1958, except contract dated March 30, 1951, which will be extended to January 1, 1960. It is further agreed that if during cutting operations Foley is hindered through flood, war or other interruptions beyond his control, the contracts may be extended by mutual agreement in time equivalent to the interruption.

6. Whenever Foley shall be conducting logging operations on property owned by Buckeye, Foley agrees that in cutting said timber, it will cut to a minimum top diameter of six inches, excepting in those tops in which large knots or clusters of knots occur. In such tops Foley shall have the right to cut immediately below such large knots or clusters of knots irrespective of diameter. All tops remaining shall be the property of Buckeye.

It is also agreed that all cutting shall be under the direction of the Buckeye Forestry Division and only trees marked for cutting by the Buckeye Forestry Division may be cut. The Buckeye Forestry Division shall have the right to terminate the cutting operation whenever such operation is being conducted in a manner detrimental to the best interest of Buckeye.

Foley agrees to pay for all timber cut from Buckeye lands, payments to be made monthly for the timber cut and scaled during the preceding month, with the stumpage rate as

determined above. Foley is to furnish Buckeye with copies of their scale tickets.

7. If either party shall be in default on any payment or performance hereunder, or under the terms and provisions of any other contract or agreement between them, and if such default be not cured within thirty (30) days' notice thereof given by registered mail to said parties in default, then in addition to any other remedies which may be available to the other party, such other party may terminate this Agreement effective at any time within sixty (60) days thereafter and in addition may terminate the contracts referred to in paragraph 5 hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their officers, in their behalf duly authorized, on the 28th day of July, 1953.

THE BUCYEYE CELLULOSE CORPORATION

BY s/ W. F. Bowld
Vice President & General Manager

(SEAL)

Attest:

s/ H. V. Hopkins
Assistant Secretary

FOLEY LUMBER INDUSTRIES, INCORPORATED

By s/ Lester W. Foley
President

(SEAL)

Attest:

s/ H. S. Aspinwall
Secretary

EXHIBIT "B"

"Foley shall have the right of first refusal to purchase any sawtimber stumpage offered for sale by Buckeye for a period of fifteen (15) years from May 4, 1953. It is agreed that any timber purchased by Foley under the terms of this contract is to be harvested by Foley using his own employees unless agreements in writing are made between Buckeye and Foley for others to do the harvesting. The price for this stumpage is to be determined by Buckeye with proper regard for the current market price of sawtimber stumpage of similar type grade and accessibility in the same locality. If Foley does not accept any such offer, Buckeye shall be unrestricted in connection with sale to other parties at same price or higher than offered to Foley. Before sawtimber may be sold to other parties at a price less than that offered to Foley, it must first be reoffered to Foley at the lower price. Nothing herein contained shall, however, prevent or in any other manner limit Buckeye from trading any of its sawtimber stumpage for pulpwood stumpage or other property.".

(R. 4-14)

ANSWER TO AMENDED COMPLAINT

(Filed: February 24 1959)

For answer to the amended complaint, the defendant says:

1. Defendant admits the allegations of paragraph 1, except those with respect to the principal office of defendant. The principal office of defendant has been in Jacksonville, Florida, since sometime in 1954 and before that time was located at Foley, Florida.

2-3. Defendant admits the allegations of paragraphs 2 and 3.

4. Defendant admits that at the time the May 4, 1953, agreement was entered into it was actively engaged in a major logging and lumbering operation as alleged, although plaintiff's sawmill which theretofore had been rented to and operated by the defendant had been shut down for dismantling on or about February 15, 1953, at the instance of the plaintiff. Defendant admits, also, that at the time the May 4, 1953 agreement was entered into, the defendant was in the process of constructing a new sawmill at Shamrock, Florida, for the purpose of utilizing timber which, at the instance of plaintiff, defendant had obligated itself to cut, in connection with operations which the defendant undertook for the plaintiff under and in accordance with the agreement of October 10, 1951, referred to in the agreement attached to the complaint. Defendant further admits that the successful operation of its new mill at Shamrock, Florida, would require defendant to buy and cut large quantities of timber on lands owned by the plaintiff and others in the area, and all of this was well known to the plaintiff as well as to the defendant. Defendant further says that it undertook the construction of its new mill at Shamrock, Florida, on the strength of assurances made to defendant by plaintiff that defendant would be given first refusal on all sawmill stumpage from plaintiff's lands. With respect to the allegation that plaintiff and defendant contemplated that defendant would acquire large quantities of pulpwood which plaintiff would be able to use in its cellulose operation at Foley, Florida, defendant says that at the time mentioned the defendant owned timber rights under contracts in which the owners specifically reserved all pulpwood rights. The terms of these contracts were well known to the plaintiff, which had guaranteed the defendant's obligations thereunder. The defendant did not then own and has not at any time since owned any lands having available pulpwood and defendant

did not then have and has not at any time since had any lease or contractural rights by which it could supply pulpwood to the plaintiff. Defendant further says that at the instance of plaintiff, and under the agreement between plaintiff and defendant dated October 10, 1951, referred to in Exhibit "A" to the complaint, defendant, prior to May 4, 1953, had negotiated for and obtained commitments from numerous large owners in the vicinity of plaintiff's mill for pulpwood to be supplied to defendant for use in plaintiff's mill when it should commence operations; that thereafter, in July of 1953, at the request of the plaintiff, the defendant delivered to the plaintiff the evidences of those commitments and released the owners from such commitments to defendant and requested favorable consideration of plaintiff in the sale of their pulpwood

5. Defendant admits that it has not offered to sell plaintiff any pulpwood since May 4, 1953, for the reason that it has not had any pulpwood for sale. Defendant, prays the same benefit of the allegations contained in paragraph 4 hereof as if those allegations were here repeated.

6. Defendant denies that during the latter part of 1954 it completely terminated its logging and lumbering operations in the northern Florida area, and further states that at all times since May, 1953, it has been actively engaged in logging and lumbering operations under certain contracts between P. C. Crapps and others, on the one hand, and Brooks-Scanlon, Inc., on the other, and under a certain contract between George H. Hodges and others, on the one part, and Brooks-Scanlon, Inc., on the other, which contracts were assigned by Brooks-Scanlon, Inc., to the defendant. The plaintiff in this action guaranteed defendant's payments under those contracts and also acquired the title to the lands subject to the contracts

between Crapps and Brooks-Scanlon, Inc. Although the defendant sold its sawmill at Shamrock, Florida, in 1955, the defendant continued harvesting timber and otherwise performing its obligations under those contracts and paid plaintiff each month for timber cut under the Crapps contract. The continued operation of that sawmill by defendant was not a condition precedent to defendant's rights under the agreement between plaintiff and defendant.

7. Defendant admits that, on or about January 3, 1955, it entered into a written agreement with Suwannee Lumber Manufacturing Co., Inc., relating to the sale by defendant to Suwannee of defendant's sawmill at Shamrock, Florida, and certain other properties, and relating to certain timber which defendant owned or had the contract right to cut. Paragraph 19 of said written agreement provided:

> "Under and by virtue of an agreement entered into on the 4th day of May, 1953 by and between The Buckeye Cellulose Corporation, the owner of the lands described in Schedules "C" and "D" hereof, and the Seller herein, the Seller was granted the first right of of refusal to purchase any saw timber stumpage offered for sale by said The Buckeye Cellulose Corporation from other lands owned by it, at a price equal to its fair market value; and Seller does hereby assign to Buyer any and all rights which it has or may have in and under such agreement, which may be subject to asignment, but with no warranty or guaranty that any such saw timber stumpage will be made available to Buyer thereunder."

Defendant further says that by defendant's said agreement with Suwannee, defendant purported to assign only such of

defendant's rights under the May 4, 1953 agreement as "may be subject to assignment"; that prior to January 3, 1955 and subsequent thereto, defendant requested plaintiff to consent to assignment of its rights under the May 4, 1953 agreement but plaintiff refused to permit defendant to assign its said rights and the assignment contemplated by paragraph 19 of defendant's agreement of January 3, 1955 with Suwannee never became effective.

8. Defendant is without knowledge of any trade of sawtimber stumpage by plaintiff for pulpwood chips. No such trades were mentioned in connection with the making of the agreement of May 3, 1953, and no such trades were within the contemplation of either of the parties.

9. The defendant admits the allegations of paragraph 9.

10. Defendant is without knowledge with respect to the claims and contentions of the plaintiff asserted in paragraphs 10(a), (b), (c) and (d), except as informed by the amended complaint herein. Defendant further says that the said claims and contentions are without basis in fact or law.

11. Defendant admits that it contends that the agreement of May 4, 1953, is valid and in full force and effect and that defendant is entitled to the right of first refusal of all sawtimber stumpage offered for sale by plaintiff, regardless of the date of acquisition of land by the plaintiff and regardless of any pretended trade of sawtimber stumpage for pulpwood chips.

12. Defendant admits the allegations of paragraph 12.

AMENDED COUNTERCLAIM

(Filed: June 30, 1959)

1. On or about July 28, 1953, plaintiff and defendant entered into an agreement in writing, a copy of which is attached to the complaint marked Exhibit "A", and subsequently, on or about December 28, 1954, agreed upon an amendment thereof whereby paragraph 2 thereof was amended to read as stated in Exhibit "B" to the complaint.

2. All conditions precedent were performed or occurred necessary to entitle defendant to first refusal to purchase sawtimber stumpage offered for sale by plaintiff.

3. Pursuant to the agreement of May 4, 1953, the plaintiff, on or about September 1, 1953, offered to defendant certain hardwood stumpage and such offer was accepted by the defendant and such hardwood stumpage was cut and accounted for pursuant to the terms of said agreement. Plaintiff has made no other offer under the terms of said agreement.

4. Notwithstanding plaintiff's agreement that defendant shall have the right of first refusal to purchase sawtimber stumpage offered for sale by Buckeye for a period of fifteen years from May 4, 1953, the plaintiff has offered for sale and sold to others than defendant sawtimber stumpage without notice to defendant and without offering defendant the right of first refusal.

5. Because of the large size of plaintiff's sawtimber holdings subject to defendant's right of first refusal, and because of the scarcity of other sawtimber in the vicinity available to supply the needs of sawmills in Taylor County and surrounding counties, defendant would have realized a profit

on each lot of sawtimber stumpage offered for sale to it under contract of May 4, 1953, in one or the other of the following ways:

(a) Defendant would have logged the sawtimber stumpage and manufactured lumber therefrom and thereby realized a profit from such operations, or

(b) Defendant would have logged such sawtimber stumpage and sold the sawtimber logs to sawmills at a profit, or

(c) Defendant would have sold such sawtimber stumpage to sawmills for logging and manufacture at a price not less than 10% in excess of the price paid by defendant to plaintiff for such sawtimber stumpage.

6. By reason of plaintiff's breaches of its agreement as aforesaid, defendant has lost profits it would have made on the sawtimber stumpage which plaintiff has sold to others, and has been otherwise damaged.

WHEREFORE, defendant demands judgment against plaintiff in the amount of $250,000.00, together with interest and costs.

(R. 20-21)

REPLY TO AMENDED FIRST COUNTERCLAIM

(Filed: August 11, 1959)

1) Plaintiff admits the allegations of paragraph 1.

2) Plaintiff denies the allegation contained in paragraph 2.

3) Plaintiff admits that pursuant to the agreement of May 4, 1953, it offered certain hardwood stumpage to defendant on or about September 1, 1953, and that said offer was accepted by defendant and the hardwood stumpage cut and accounted for pursuant to the terms of said agreement. Plaintiff denies it has made no other offers under the terms of the May 4, 1953 agreement.

4) Plaintiff admits it has offered for sale and sold to others than defendant sawtimber stumpage without notice to defendant and without offering defendant the right of first refusal thereon. Planitiff states, however, that in so doing it has not violated or breached the said agreement of May 4, 1953.

5) Plaintiff denies the allegations of paragraphs 5 and 6 and each and every other allegation contained in the Amended First Counterclaim not herein specifically admitted to be true.

WHEREFORE, Plaintiff prays judgment against defendant on the Amended First Counterclaim.

(R. 24-25)

DEMAND FOR JURY TRIAL

(Filed: September 30, 1958)

The defendant demands trial by jury of all issues.

(R. 27)

ORDER (ON PRE TRIAL)

(Filed: October 27, 1959)

This cause coming on this day to be heard for final pre-trial conference, and counsel for the respective parties being present and heard thereon, it is upon consideration hereby

ORDERED:

1. That the trial of this cause by jury be held at Tallahassee beginning at 10:30 A.M., Monday, February 15, 1960.

2. That counsel for the respective parties be present for a conference with the Court at 9:30 A.M. on that day.

3. Counsel for the respective parties will submit a brief memoranda of their statement of the issues to the Court on or before February 1, 1960, mailing copies to opposing counsel.

DONE AND ORDERED in Chambers at Tallahassee this 27th day of October, 1959.

/s/ G Harrold Carswell

G. HARROLD CARSWELL
UNITED STATES DISTRICT JUDGE

(R. 27-28)

TRANSCRIPT OF TRIAL PROCEEDINGS

(Filed: March 25, 1960)

Tallahassee, Florida

February 15, 1960

BEFORE:

HONORABLE G. HARROLD CARSWELL,

UNITED STATES DISTRICT JUDGE

APPEARANCES:

J. LEWIS HALL, ESQ.
Tallahassee, Florida

WM. A. GEOGHEGAN, ESQ.
Union Central Bldg.
Cincinnati, Ohio

JOHN McDOWELL, ESQ.
Union Central Bldg.
Cincinnati, Ohio

ATTORNEYS FOR PLAINTIFF

CHESTER BEDELL, ESQ.
C. HARRIS DITTMAR

OF McDELL, BEDELL, & DITTMAR
Jacksonville, Florida

ATTORNEYS FOR DEFENDANT

THE COURT:

Good morning. Be seated, please.

Court has convened at this time for the trial of the case The Buckeye Cellulose Corporation versus Foley Lumber Industries, Inc. Is the plaintiff ready?

MR. HALL:

The plaintiff is ready.

THE COURT:

Is the defendant ready?

MR. BEDELL:

Yes, Your Honor.

THE COURT:

Proceed to call a jury.

(A jury of twelve selected, empaneled and sworn)

(R. 35-36)

(Jury out of courtroom.)

THE COURT:

As a result of the numerous conferences the Court has had with counsel in Chambers, portions of the last having been made part of the record, and a statement of the definition of the issues at that time being made up, the Court is now ready to proceed with the plaintiff leading on the question

as set forth in their complaint on the issue of consideration and to the mutuality and dependency of Clauses 2 and 3 of the contract. Mr. Bedell.

MR. BEDELL:

May it please, Your Honor, we don't consent to the withdrawal of the jury to determine any question that is properly determinable by a jury here. I am sure that is understood.

THE COURT:

Certainly.

(R. 39)

• • •

MR. HALL:

(Counsel read portions of the pleadings)

Your Honor, on the basis of the facts alleged and admitted in the answer, we submit that the clauses in the contract of the defendant and the admissions in the answer are sufficient to show justification for entry of a judgment for the plaintiff on the pleadings, and we now so move.

Your Honor please, may I withhold that motion and submit a statement contained in the deposition of Mr. Lester W. Foley, taken October 31, 1958, and filed in this cause.

MR. BEDELL:

What is the page, please?

MR. HALL:

Page 90. This question was asked:

"In other words, you never did conduct the lumbering operations that you contemplated at the time of this contract?

Answer: "No, I had no other properties at that time, no sir, other than the commitment that I received from the adjoining landowners. I would like to say too that Buckeye was never in a position to receive any pulpwood from me because, as I recall, the date that I have with the commencement of their operation at Foley was maybe the fall of 1954, or something like that, when that mill started. Had I had any pulpwood, they couldn't—they weren't even in position to receive it from me or from any other people."

Your Honor please, there are numerous other statements, however, on the basis of the admissions in the pleadings and the statements by Mr. Lester Foley, who was Chief Executive Officer of the defendant corporation, to the effect that the lumbering operations contemplated at the time of the contract have never been carried out, we move for judgment.

THE COURT:

Mr. Bedell.

MR. BEDELL:

Is that the plaintiff's case, Your Honor?

THE COURT:

I suppose so. I might comment that before the Court could enter any ruling on the motion just made it is necessary to

take into consideration the contract, itself, which is in the pleadings; that is, the actual instrument made on May 4, 1953, in addition to whatever else counsel for the respective parties wish to introduce.

MR. HALL:

Your Honor please, I think that May 4th agreement is attached in its entirety as amended to the complaint alleged and also admitted as a true and correct copy.

THE COURT:

Yes, I just want to clarify the record that what the Court is really being called upon to do here is to construe the provisions of the contract in the light of the answer and the probative portions of the deposition.

MR. HALL:

The admitted facts surrounding the contract.

THE COURT:

With particular reference to the mutuality or the dependency of paragraphs 2 and 3.

(R. 44-46)

(Testimony offered by Defendant)

MR. GEOGHEGAN:

Your Honor, I would like to know if we are proceeding with the trial of this case this afternoon or are we proceeding with

a hearing on a motion. This witness has been called in opposition of a motion and they have no right to open the case.

THE COURT:

I understand that but I don't see where he is going yet. We have to see where he is going.

MR. GEOGHEGAN:

We are not in the trial of the case, we are only conducting a hearing on the motion for judgment on the pleadings.

THE COURT:

Yes. And also as announced in chambers, let the record show this too, that the Court said it would take testimony surrounding this particular issue for me to decide if the Court can do so and if there are areas where there are no disputed facts of a substantial nature where the Court can enter a ruling, it is obviously the responsibility of the Court to give you a ruling on that before we proceed with other questions.

(R. 49-50)

(More testimony offered by Defendant and rebuttal testimony offered by Plaintiff)

THE COURT:

All right, sir. Gentlemen I want to ask you now, it is rather late – in spite of all the lengthy proceeding we have had today and previous to this, it seems to me that we have boiled it down here to something rather specific, pin-pointed, and

rather clear. I want to ask the benefit of counsel at this time by method of affording you an opportunity to make a brief argument, to point out to me wherein the facts are in dispute on this issue. In my offhand views of the matter the interpretation of these facts are quite disputed it is obvious, but without any further comment from the court, I would like to afford counsel for each party to state, if any, where the facts are in controversy on this issue. Mr. Hall.

MR. HALL:

Your Honor please, it has been our contention and it developed at the pre-trial conference, that there are no issues of fact in relation to the point before the court, because the admissions and the answer established the facts showing the conditions that existed at the inception of the May 4, 1953 agreement that were essential to carrying out the purposes and the intent of the parties in making this contract.

Your Honor, please, we take the position that there are no issues of facts, there are no disputed facts, that all of the facts alleged by the plaintiff necessary to make out this case showed the dependency of these provisions of the contract and the breach having been admitted by the defendant.

THE COURT:

Mr. Bedell.

MR. BEDELL:

Your Honor, I don't know how to proceed here. It is a most unusual procedure. The plaintiff having moved for judgment on pleadings; and, of course, read the pleadings: Now, most

of the evidence is evidence which we introduced. I called the first witness and only after I had introduced certain facts did the plaintiff see fit to recall some of the same witnesses and introduce others.

THE COURT:

Well, let me say here for the clarification of the record, and I am certainly sure, Mr. Bedell, whether the matter be judgment labelled or entitled judgment on the pleadings or not, the matter is before the court on a set of facts, which, if not in controversy, this court is authorized then and required as a matter of fact and has the affirmative responsibility of entering a ruling of law. The pleadings, some of the matters in the pleadings have been alluded to and counsel for both sides have been given in this proceeding rather wide latitude, as has already been commented on, in putting in whatever they could, even remotely relevant to showing the relationship of the parties and to – on this particular issue – and the meaning and intention of the parties in drawing up, particularly, paragraphs 2 and 3 of the contract, limiting it to that particular issue. So there should not be any confusion as far as that is concerned as to where we stand and where we have at least come from at this point.

MR. BEDELL:

My position is – I don't know if this is an appropriate reply to what you have asked me – but my position is, as a matter of law, that Your Honor must rule that paragraph 3 of the contract or agreement of May 4, 1953 does not impose upon Foley any obligation to engage in lumbering operations which will be productive of pulpwood to be offered by Foley to Buckeye. That is my position in a nut-shell and I have a

decision of the Court of Appeals, Fifth Circuit, I would like to cite to your Honor.

THE COURT:

All right, sir. I would like to hear it.

(R. 97-100)

(Argument by Counsel)

THE COURT:

No, sir, what bothers me here is the Dickerson case as compared to the case at issue here. As I see it, the obligation is on the court to read the agreements and I have taken this testimony here – we haven't got a jury here to be concerned with, therefore, the rules have been rather relaxed. But I think the language here is very clear, there is no intention of this court here to go against the philosophy of the Dickerson case and attempt to read something into the contract that is not there. What I have got here to deal with is not so much that as I see it, Mr. Bedell, as it is this – the facts are not in dispute at all here as to the utter impossibility of performance of paragraph 3 by Foley. It is not so much to impose an affirmative burden upon them to fully operate a mill.

MR. BEDELL:

What do you mean by utter impossibility of performance?

THE COURT:

The mutual promises as exhibited by paragraph (sic) 2 and 3. It would be extremely difficult for the court to give credence

to the language of paragraph 2 and immediately turn around and use your words, find paragraph 3 to be wholly incidental. I don't see how I can do that. Therefore, I don't think it is quite the same thing as the Dickerson case, except for the fact I have been admonished by a recent opinion of Judge Tuttle that the court should be very careful in letting in a lot of matters and testimony about what they remember going into the contract. That has all been received with a great deal of caution by the court although each of you have put some of it in the record.

(Further discussion off the record.)

(R. 107-108)

• • •

THE COURT:

Gentlemen, I don't believe it will serve any useful purpose to reserve ruling of the court and I feel we must proceed with this matter.

We have had here a rather exhaustive discovery, pre-trial motions, depositions, arguments of counsel, following this matter. As a result of all that, the issue has come on before the court on the motion of plaintiff for a declaration of rights under a contractural agreement entered into May 4, 1953, and with particular reference to the consideration of paragraphs 2 and 3 of this contract, in the light of all the other provisions of the contract.

The testimony here that has been admitted, if not absolutely and completely undisputed, is substantially undisputed on all material matters. The answer of the defendant, the

depositions, and the testimony that was taken, leads the court to the conclusion that paragraphs 2 and 3 of this contract of May 4, 1953, are mutually dependent and that they are in fact the very core of the agreement.

The quip pro co (sic) of the parties of the agreement, one to the other, saw timber, right of refusal from Buckeye to Foley, pulpwood right of refusal from Foley to Buckeye, the court has given consideration and particular attention to the cases cited by defendant, the Pfann case referred to and the Dickerson case, and with reference to the Pfann case the court does not by this ruling say that Foley has been placed upon it an affirmative burden to operate a lumbering operation, but the court does find that by these two agreements – Foley to offer pulpwood and Buckeye to offer saw stumpage on like terms – that the whole agreement would be utter meaningless and pointless and absolutely no consideration running to Buckeye for this operation. Without reference to the rather full testimony going to matters leading to the contract of 1953, the court finds this is true. Also, all the testimony with reference to other provisions of the contract and, also, the testimony with reference to the hardwood harvesting doesn't alter this finding but, in fact, tends to support the finding of the court in this regard.

Therefore, the court will grant the motion and appropriate settle order will be presented by counsel and be filed in the case. This verbal order is now of record.

Now gentlemen, that being the situation, where do we stand with reference to this lawsuit?

MR. BEDELL:

I suppose your Honor's ruling that because Foley has not engaged in the lumbering operation which has been productive of pulpwood and has not offered any pulpwood to Buckeye, that Buckeye was not and is not obligated to offer Foley the first refusal and I assume your Honor will enter a decree so construing the contract and dismissing Foley's counterclaim. I suppose that ends the lawsuit. That is the way I regard it.

THE COURT:

I was under the impression that that was a pretty final order, Mr. Bedell. I did realize that but I was wondering if there was anything I had overlooked that we had—the hair with the hide so-to-speak.

(R. 108-110)

No. 1303

IN THE

Supreme Court of the United States

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

FOLEY LUMBER INDUSTRIES, INC.,

Petitioner,

v.

THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

COUNTERSTATEMENT OF QUESTION PRESENTED

In an effort to add substance to his contentions, Petitioner has presented three questions in his argument to this Court. These questions assume facts completely at variance with the record. There is only a single question here:

> Was the District Court correct in concluding that there was no genuine issue as to any material fact bearing upon the question of whether paragraphs 2 and 3 of the contract were mutually dependent and whether the contract had become inoperative?

COUNTERSTATEMENT OF THE CASE

The amended complaint filed herein by The Buckeye Cellulose Corporation, an Ohio corporation, hereinafter

called "Buckeye," against Foley Lumber Industries, Inc., a Florida corporation, hereinafter called "Foley," sought declaratory judgment that a certain agreement between the parties of date of May 4, 1953 was null and void, or, in the alternative, if such agreement was still in effect the amended complaint sought a declaration of the effect of said agreement.

The gist of the agreement of May 4, 1953 is contained in two provisions, to-wit: Paragraph 2, as amended (R. 13) wherein Foley had right of first refusal of any sawtimber stumpage offered for sale by Buckeye for a period of fifteen (15) years from May 4, 1953, and Paragraph 3, wherein Foley agreed to offer to Buckeye, upon usual and customary terms, all pulpwood obtained in its lumbering operations, wherever conducted, at the current market price. (R. 10)

The amended complaint alleged, *inter alia*, that Buckeye was engaged in the manufacture of cellulose products from pulpwood; that such manufacturing required Buckeye to maintain adequate supplies of pulpwood, all of which was known to Foley; that at the time the May 4, 1953 agreement was entered into Foley was actively engaged in a major logging and lumbering operation in northern Florida and was in process of constructing a sawmill, the successful operation of which would require Foley to buy and cut large quantities of timber on lands owned by Buckeye and others in the area, and the parties anticipated that in the course of its contemplated logging and lumbering operations Foley would acquire large quantities of pulpwood which Buckeye would be able to acquire for use in its manufacturing operations; that in the latter part of 1954 Foley terminated its logging and lumbering operations in the area and that at no time has Foley ever offered Buckeye any pulpwood. (R. 5-6)

Foley filed answer denying that the May 4, 1953 agreement was of no effect but in its answer admitted the material allegations of the complaint including specifically ". . . that at the time the May 4, 1953 agreement was entered into, it (Foley) was actively engaged in a major logging and lumbering operation . . ." and ". . . that at the time the May 4, 1953 agreement was entered into the defendant (Foley) was in the process of constructing a new mill at Shamrock, Florida . . ." and ". . . that the successful operation of its new mill at Shamrock, Florida, would require defendant to buy and cut large quantities of timber from lands owned by the plaintiff and others in the area . . ." and ". . . that it has not offered to sell plaintiff any pulpwood since May 4, 1953. . . ." (Parenthetical insertions ours.) (R. 14-18)

Foley incorporated a counterclaim in its answer on points not material to this appeal and demanded trial by jury.

Three pretrial conferences were held and both parties utilized the discovery procedures by depositions, interrogatories and requests for admissions. Immediately prior to trial after the jury was sworn, a conference of Court and counsel was held in chambers and in the course thereof motion for judgment on the pleadings was made by counsel for Buckeye, which motion was renewed in open Court and treated by the Court as motion for summary judgment. (R. 40-45)

Testimony was taken on the motion and at the conclusion thereof, the Court ruled in substance that Paragraphs 2 and 3 of the agreement of May 4, 1953 are mutually dependent, that is, the provision in Paragraph 2 giving right to Foley of first refusal of sawtimber stumpage offered for sale by Buckeye and the provision in Paragraph 3 that Foley would offer to Buckeye all pulpwood procured by it,

were mutually dependent provisions, and "in fact the very core of the agreement," and the admitted basic facts demonstrated conclusively that it was impossible for Foley to perform the agreement and the agreement was therefore of no force and effect. (R. 107-110)

On appeal the Court of Appeals affirmed the judgment of the District Court except the District Court's denial of Foley's motion for determination of date when the May 4, 1953 agreement became of no effect.

REASONS FOR DENYING WRIT OF CERTIORARI

I. There Are No Substantial Issues Nor Questions Presented in This Cause Warranting Granting of Certiorari By This Court.

The rules of this Court (Rule 19) provide that review by certiorari is not a matter of right but will be granted only where there are "special and important" reasons therefor. We will not attempt to enumerate the specific considerations that guide this Court in the exercise of its discretion in granting review by certiorari, but suffice it to say that petitioner has not shown that this case measures up to the requirements of the rules.

The sole determinative issue in this cause is the interpretation of a contract between the parties in the light of certain facts relevant thereto, and as we will hereinafter show, this issue is not even before this Court for review. The sole contention advanced by petitioner as grounds for review by this Court is that the summary judgment procedure followed by the District Court and approved by the Court of Appeals deprived petitioner of his right to a jury trial. However, in the Court of Appeals petitioner recognized the insignificance of this issue and candidly admitted on page 6 of its Reply Brief that "Foley is not here insisting so much that the facts material to the issue determined

by the District Judge are in dispute, as that the District Judge erred in ruling as he did on the evidence introduced."

In the Court of Appeals the basic contention of petitioner was that the District Court erred in holding that the provisions in Paragraphs 2 and 3 of the contract wherein Buckeye granted to Foley first refusal rights to sawtimber stumpage and Foley agreed to sell pulpwood to Buckeye were mutually dependent provisions, *yet such holding by the District Court and the affirmance thereof by the Court of Appeals is not assigned by petitioner as ground for review by this Court.* The significance of this omission is best demonstrated by reference to petitioner's reply brief in the Court of Appeals, page 7, wherein it is stated:

> "although Judge Carswell's (procedural) rulings do not entirely dispose of the case and it must be returned for retrial, his erroneous construction of the agreements must be corrected, *otherwise a retrial before Judge Carswell will necessarily result in a further appeal.*" (Emphasis ours)

Thus petitioner has admitted that the procedural issue presented to this Court is academic and not determinative of the cause and that it could not prevail upon retrial unless the interpretation of the contract by the District Court and the Court of Appeals was reversed. Since such interpretation is not before this Court for review, the interpretation adverse to petitioner has become finalized and the futility of the petitioner's position and the uselessness of review of this cause by this Court is clearly apparent.

In conclusion, we submit that petitioner has not shown any "special and important" reason for review; there is no federal question of substance involved herein; there is no conflict between the decision of the Court of Appeals and the decision of another Court of Appeals on the same matter; and there is no sufficient departure from the accepted and usual course of judicial proceedings as to call

for the exercise of this Court's power of supervision.

The only issue in this cause is one of interpretation of a contract between the parties. This is an issue of local law and it has been settled by the District Court and the Court of Appeals in the usual and accepted course of judicial proceedings and this interpretation has not been assigned as grounds for review.

II. The Procedure Followed By The District Court Did Not Deprive Petitioner of His Right to a Jury Trial.

It should be noted at the outset that, although one member of the Court of Appeals dissented from the majority opinion affirming the judgment of the District Court, the dissenter, as well as the majority, concluded that the summary judgment procedure followed by the District Court was appropriate in view of the lack of dispute as to any genuine issue of material fact.

The contention that the District Court invaded the province of the jury by inquiring into the issues of consideration and mutuality is dispelled by the very record references cited by petitioner in support of this. Pursuant to respondent's motion for judgment on the pleadings, the District Court conducted a hearing for the sole and limited purpose of determining whether any genuine issue of fact was present. (R. 49-50) Counsel were so advised and the Court specifically requested petitioner to point out the areas of factual dispute, if any existed. (R. 97-98); Petitioner failed to cite any issue of fact and instead stated:

> ". . . my position is, as a matter of law, that your Honor must rule that paragraph 3 of the the contract or agreement of May 4, 1953 does not impose upon Foley any obligation to engage in lumbering operations which will be productive of pulpwood to be offered by Foley to Buckeye. That is my position in a

nut-shell and I have a decision of the Court of Appeals, Fifth Circuit, I would like to cite to your honor." (R. 99-100)

A clearer statement that the issue was one of law rather than fact is difficult to imagine. The District Court thereupon concluded on the basis of the pleadings, depositions and testimony that the material facts were undisputed and that Paragraphs 2 and 3 of the contract were mutually dependent. Since petitioner was admittedly unable to carry out its part of the contract, the Court concluded as a matter of law that the contract was no longer in effect. (R. 108-110) The procedure followed by the District Court is specifically authorized by Rule 12(c) of the Federal Rules of Civil Procedure.

Petitioner's quarrel is with the legal conclusion reached by the District Court in interpreting the contract. Since a question of Florida contract law does not afford any basis for review by this Court, petitioner has engaged in pure semantics in an effort to convert this question into an issue of "the conclusions or inferences to be drawn from the facts." (Petitioner's brief at page 14.) No issue of factual inference was present before the District Court. The disputed inferences to which the District Court made reference (R. 98) resulted solely from application of different legal theories to the same set of facts. Petitioner recognized this in its argument to the District Court and to the Court of Appeals that its promise was merely "an output promise" which, as a matter of law, only bound Foley to offer Buckeye the pulpwood obtained in connection with its lumbering operations, and to forbear from selling to others. Petitioner's present contention that the issue is one of inferences or conclusions to be drawn from undisputed facts by the jury is baseless and should be recognized for what it

is—a poorly disguised artificial issue contrived solely to avoid this Court's policy of refraining from reviewing matters involving only interpretation of state substantive law.

Finally, petitioner makes the curious contention that it was prejudiced because the Court of Appeals affirmed the District Court on a different theory and foreclosed petitioner from offering evidence. The curious aspect of this contention arises from the fact that the only aspect in which the Court of Appeals differed with the District Court operated to petitioner's benefit.

It is clear from the oral opinion of the District Court and the opinion of the majority of the Court of Appeals that the basic conclusion was the same in both instances—that the promises of Paragraphs 2 and 3 of the contract were mutually dependent and that petitioner's inability to perform rendered the contract inoperative. However, the Court of Appeals found the record insufficient to show the time at which the contract became inoperative. Consequently, the judgment dismissing Foley's counterclaim for damages was reversed and remanded to the District Court for determination of this issue and also to determine whether there was a genuine issue of material fact as to whether Buckeye breached the contract before it became inoperative. On the basic issue of mutuality, the Court of Appeals reached the same conclusion as the District Court and upon the same theory. Petitioner had ample opportunity before the District Court and the Court of Appeals to point out any issues of fact bearing upon the determinative questions in this case. Petitioner failed to do so on these occasions and petitioner has failed to do so in his argument to this Court.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied for the reasons that:

1. The petition presents no substantial issues or important reasons warranting review by this Court.
2. The procedure followed by the District Court did not deprive petitioner of his right to a jury trial.

Respectfully submitted,

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No. 953

Supreme Court of the United States

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 953

FOLEY LUMBER INDUSTRIES, INC.,

Petitioner,

vs.

THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

In both Courts below petitioner Foley gave much importance to its right to trial by jury.

In the District Court, it was Foley that demanded trial by jury. (R. 27.) And when, after the jury was sworn, the District Judge excused the jury to resolve "purely legal questions" for the purpose of "a great deal of saving in time for you [the jury] and everyone else" (R. 38), counsel for Foley announced, "We don't consent to the withdrawal of the jury to determine any question that is properly determinable by a jury here." (R. 39.) Of course, when the District Judge persisted in going forward without the jury, counsel for Foley had no choice but to contend that "as a matter of law, your Honor must rule that paragraph 3 of

the contract or agreement of May 4, 1953 does not impose upon Foley any obligation to engage in lumbering operations which will be productive of pulpwood to be offered by Foley to Buckeye." (R. 99-100.) Following entry by the District Judge of his "Declaratory Judgment Order" (R. 155), Foley filed a motion to amend that order to correctly reflect what had transpired (R. 156), together with a motion for a new trial, the first two grounds of which were based upon the substitution of a summary procedure for a jury trial. (R. 158.)

Similarly, upon the appeal to the Court of Appeals, the first two of appellant's statement of points were based upon the error of the District Court in disposing of the case by summary procedure instead of by submitting the issues to the jury. (R. 161.) And the first point argued in Foley's Brief in the United States Court of Appeals was that "The procedure followed by the District Judge wrongfully deprived Foley of its right to a trial by jury."

The procedural error of the District Judge was compounded by the error of the Court of Appeals in attempting to dispose of the appeal by examining the facts and circumstances to determine, as a matter of law, the intent of the parties in using the words of the written agreement. For the District Judge had excluded some of the evidence offered by Foley which was relevant to that consideration if parol evidence was admissible for that purpose. (R. 70-72.) Moreover, upon that question the factual showing made by the record was subject to conflicting inferences.

The Court of Appeals could have rejected the parol evidence upon the theory adopted by Judge Tuttle that the meaning of the written agreement should be determined as a matter of law from the words of the agreement. But when the majority of the Court of Appeals ruled that the

agreement was ambiguous so as to make parol evidence admissible in determining the parties' intent, they should have remanded the case for submission to a jury. The jury, not the Court of Appeals, is the proper tribunal for resolution of the conflicting inferences to be drawn from the undisputed, as well as from the disputed, facts.

II.

The procedural errors are not "academic." They have so confused the issues made by the pleadings and the facts bearing upon those issues that it is almost impossible to tell from the record what issues were tried and determined. It is not surprising that the Court of Appeals erroneously assumed that "Foley ceased to be engaged in any logging and lumbering operation" (R. 194), although that assumed fact was denied by Foley's answer (R. 16) and was neither admitted, tried nor proved. Nor is it surprising that the District Judge erroneously assumed an "utter impossibility of performance of paragraph 3 by Foley" (R. 107) in decreeing that the agreement "is now of no force and effect" (R. 156), although no issue was made as to the "impossibility of performance" and at the time of the entry of that order the contract had eight years yet to run and no evidence was introduced to the effect that Foley could not position itself, during the remaining period, to fully comply with the condition found by the Court (erroneously, we contend) to be essential to entitle it to performance by Buckeye.

Petitioner's insistence upon its right to a determination by a jury of the issues which the jury had been sworn to try is not, as respondent suggests, "a poorly disguised artificial issue contrived solely to avoid this Court's policy of refraining from reviewing matters involving only inter-

pretation of state substantive law." (Respondent's Brief, p. 8.) A gross injustice has been done. This injustice has resulted from the substitution of a summary trial of two issues for the plenary trial by jury of all issues to which Foley was entitled.

The decision of the Court of Appeals approving the summary procedure adopted by the District Judge raises a serious and important question concerning the continued vitality of the constitutional right of trial by jury and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel.